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No. 87-1728

In the Supreme Court of the United States

OCTOBER TERM, 1987

GERMANTOWN SAVINGS BANK,
AND I.C.S. CORPORATION,

Appellants,

v.

CITY OF PHILADELPHIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION TO DISMISS OR AFFIRM

Appellee, the City of Philadelphia, moves this Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of Pennsylvania on the grounds that there exists no final judgment within the meaning of 28 U.S.C.§ 1257(2); that Appellants' statement of jurisdiction fails to comply with U.S. Supreme Court Rule 28.4(c); and that the question on which the decision of the appeal depends is so insubstantial as not to need further argument.

STATEMENT OF FACTS

Appellants, Germantown Savings Bank and I.C.S. Corporation, instituted separate actions against Appellee, the City

of Philadelphia, for damages under the provisions of the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. §§8541 *et seq* (hereinafter referred to as "Tort Claims Act"). On motions from partial summary judgment, Appellee was successful in obtaining a ruling that, in accordance with Section 8553(d) of the Tort Claims Act, Appellants were precluded from recovering for losses which were the subject of a policy of insurance.

No judgment has been rendered on the questions of liability or damages.

While not contesting the applicability of the provisions of Section 8553(d) of the Tort Claims Act to themselves, the Appellants have constitutionally challenged the applicability of Section 8553(d) to their insurer, the Federal Insurance Company.

Appellants moved the trial court to amend its two orders granting the City's motions for partial summary judgment to include certification under, 42 Pa.C.S. §702(b),[1] that the orders involved controlling questions of law to which there are substantial grounds for difference and that an immediate appeal may materially advance the ultimate termination of this matter. Said motions were granted on October 10, 1984 in the Germantown Savings Bank case and on October 12, 1984 in the I.C.S. Corporation case.

The Commonwealth Court limited the interlocutory appeals to the issue of whether 42 Pa. C.S. §8553(d) violated the equal protection guarantees of the state and federal constitutions:

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1. Section 702(b) of the Pennsylvania Judicial Code provides that:

Interlocutory appeals by permission.—When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

ORDER

NOW, February 21, 1985, upon consideration the petitions of I.C.S. Corporation and Germantown Savings Bank for permission to appeal and the responses thereto, said petitions are granted and said appeals are allowed from the orders entered in the Court of Common Pleas of Philadelphia County on October 10, 1984, in September Term, 1982, No. 897 and October 12, 1984, in May Term, 1983, No. 5803 respectively. Said appeals shall be limited to whether 42 Pa.C.S. §8553(a) [sic] is unconstitutional as violative of equal protection. *See* Pa. R.A.P. 1321; *Michel v. City of Bethlehem*, ____ Pa. Commonwealth Ct. ____, 478 A.2d 164 (1984).

On July 7, 1986, the Commonwealth Court, sitting *en banc*, held that Section 8553(d)'s prohibition against recovery for insured losses did not, *inter alia*, violate the equal protection clause of the Constitution of the United States of America. The Commonwealth Court reached this decision by applying the rational relationship test to a statutory provision limiting a party's right to full economic compensation.

The Supreme Court of Pennsylvania, on January 22, 1988, after oral argument, in a per curiam decision affirmed the ruling below of the Commonwealth Court.

ARGUMENT

I. No Final Judgment Or Decree Is Present

As set forth in Appellants' jurisdictional statement, the appeal has been taken under the provisions of 28 U.S.C. §1257(2), which states that

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

> repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor if its validity.

There is no question that Section 1257 embraces as a prerequisite to an appeal the concept of finality. The purpose of this finality requirement is to avoid piecemeal review of state litigation; to prevent the rendering of advisory opinions; and to promote the concept of federalism by limiting unwarranted intrusion in state affairs:

> The finality requirements of 28 U.S.C. §1257, which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to have at a minimum federal intrusion in state affairs.

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973); *Accord, Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). In order for a judgment or a decree to be considered final, it must effectively determine the litigation, leaving no nonministerial matter to be judicially decided. *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947).

Clearly the aforementioned requirement is not present here. The decision below is admittedly an interlocutory appeal. There has been no judgment in the Pennsylvania courts on the issues of liability or damages. There has been no adjudication of any present right of Appellants, premised on any established facts. *See, e.g., Aetna Life Insurance Co. v. Haworth*, 360 U.S. 227 (1937), *rehearing denied*, 360 U.S. 687 (1937). For all practical purposes, the state court litigation is in its earliest stages and any compensation that may be granted Appellants is purely hypothetical.

Moreover, the constitutional question may indeed be rendered moot by subsequent proceedings in the state judicial system. For example, a decision in favor of Appellee may be

rendered on the question of liability, thus nullifying any constitutional questions. A judgment is not final for purposes of 28 U.S.C. §1257 if the federal issue may not survive future state court proceedings. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

II. Appellants Have Failed To Satisfy The Prerequisites of Rule 28.4(c)

Supreme Court Rule 28.4(c) requires that, in a proceeding in which the constitutionality of a state statute is drawn into question, Appellants must set forth in their initial pleading, motion or paper filed with the Court that 28 U.S.C. §2403(b) may be applicable and must serve said pleading, motion on paper upon the Attorney General of the applicable state.[2]

In the appeal *sub judice,* Appellants explicitly challenge

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2. In its entirety, Rule 28.4(c) of the United States Supreme Court Rules reads as follows:

> (c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. §2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. §451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. §2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

Similarly, 28, U.S.C. §2403(b) provides that:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

the constitutionality of an act of the Pennsylvania General Assembly, which act concerns the conduct of local governmental units. However, no notice of the applicability of 28 U.S.C. §2403(b) or notice of service upon the Attorney General of the Commonwealth of Pennsylvania can be found in Appellants' filings in this Court.

III. As The Only Right Involved In This Appeal Is Economic, There Exists No Substantial Federal Question

Appellant challenges the provisions of Section 8553(d) of the Political Subdivision Tort Claims Act, 42 Pa. C.S. §8553(d), as violative of the equal protection guarantees of the Fourteenth Amendment to the United States Constitution. As Section 8553(d) of the Tort Claims Act, which is set forth at page 8 of this motion, merely prohibits recovery against political subdivision for losses covered by a policy of insurance, the only right involved is an economic right. This Court has long recognized that: there is a "traditional presumption of constitutionality generally accorded economic regulations and that ... [said regulations must] be upheld absent proof of arbitrariness or irrationality on the part of ... [the legislature]. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978).

A. SECTION 8553(d) OF THE TORT CLAIMS ACT EMBODIES A LEGISLATIVE BALANCING OF ECONOMIC INTERESTS, PRECLUDING ANY PERSON FROM RECOVERING FOR LOSSES COMPENSABLE UNDER A POLICY OF INSURANCE

In order to understand the full scope and meaning of Section 8553(d) of the Tort Claims Act, 42 Pa.C.S. §8553(d), the statutory provision must be considered in light of the evil intended to be remedied by the legislature. *See, Smith v. City of Philadelphia*, 512 Pa. 129, 516 A.2d 306 (1986), *appeal dismissed*, ____ U.S. ____, 107 S.Ct. 1265 (1987); and *Singer v. Sheppard*, 464 Pa. 387, 346 A.2d 897 (1975). The General

Assembly of the Commonwealth of Pennsylvania enacted the Tort Claims Act, 42 Pa. C.S. §8541 *et seq.*, as a direct result of the judicial abrogation of governmental immunity. *See Carroll v. County of York*, 496 Pa. 363, 437 A.2d 394 (1981). Section 8541 of the Tort Claims Act expressly provides for a broad grant of governmental immunity:

> Except as otherwise provided in this subchapter, no local agency shall be liable for *any* damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa.C.S. §8541. (emphasis added). The General Assembly then proceeded to carve out eight narrow exceptions to this general legislative grant of immunity. *See*, 42 Pa.C.S. §8542. These exceptions are to be narrowly construed:

> Since . . . [Section 8542(b) is an exception to the rule of immunity, we believe that its extent must be narrowly interpreted given the expressed legislative intent to insulate political subdivisions from tort liability.

Mascaro v. Youth Study Center, 514 Pa. 351, 523 A.2d 1118, 1123 (1987).

Even within the eight narrow exceptions to immunity, the Pennsylvania legislature has limited the amount and type of damages a person could otherwise recover:

> §8553. *Limitations on damages*
>
> (a) *General rule.*—Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.
>
> (b) *Amounts recoverable.*—Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transaction or occurrences shall not exceed $500,000 in the aggregate.
>
> (c) *Types of losses recognized.*—Damages shall be recoverable only for:
>
> 1. Past and future loss of earnings and earning capacity.

2. Pain and suffering in the following instances:

(i) death; or

(ii) only in cases of permanent loss of a bodily function, permanent disfigurement or permanent dismemberment where the medical and dental expenses referred to in paragraph (3) are in excess of $1,500.

3. Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accured and anticipated in the diagnosis, care and recovery of the claimant.

4. Loss of consortium.

5. Loss of support.

6. Property losses.

(d) *Insurance benefits.*—If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

42 Pa.C.S. §8553. Given the expressed legislative intent to insulate political subdivisions from liability for torts and given the legislative intent to specify the amount and type of damages for which a person may recover, Section 8553(d) must be construed to promote such legislative mandate. It *bars* any person or entity from recovery for insured losses. There is no exception to this bar.

1. Parties, Who Have a Cause of Action Against the City of Philadelphia, Cannot Recover Losses for Which They Are Insured

As set forth in subparagraph (d) of Section 8553 of the Tort Claims Act, 42 Pa. C.S. §8553(d), no person, who is injured by the negligent conduct of a political subdivision that

falls within one of the eight narrow exceptions to immunity and who receives or is entitled to receive benefits under a policy of insurance, can recover such amounts from a political subdivision. As noted by the Commonwealth Court, Appellant, I.C.S. Corporation, ("ICS") has received from its insurer $10,212.29 for damages; ICS has sought a judgment against, Appellee, the City of Philadelphia, in an amount in excess of $20,000. *Germantown Savings Bank v. City of Philadelphia*, 98 Pa. Cmwlth. 508, 506, n.1, 512 A.2d 756, 757 n.1 (1986), *affirmed per curiam*, ____ Pa. ____, 535 A.2d 1052, (1988). Similarly, Appellant, Germantown Savings Bank ("GSB"), while asserting a claim against Appellee for $44,662.30 in damages, has received $44,162.30 from its insurance company. Thus, clearly, by the expressed terms of Section 8553(d), if there is a judgment against Appellee on the question of liability and if damages are calculated as alleged by Appellants, ICS will be limited to recovering from the City, damages, otherwise recoverable, in excess of $10,212.29, while the amount of damages that GSB can recover against the City will be limited to $500.00. On the other hand, Federal Insurance Company, which has suffered no losses falling with the eight narrow exceptions to immunity, can recover nothing. In other words, Section 8553(d) provides that recovery on a claim against a local government is limited to the amount of uninsured loss, regardless of the identity of the claimant.

2. As the Federal Insurance Company Has No Independent Cause of Action Against the City and As the Doctrine of Subrogation Gives It No Rights Higher Than Its Insureds, Said Insurance Company Has Not Been Denied Access to the Pennsylvania Courts

Firstly, Federal Insurance Company has no cause of action against the City under the Tort Claims Act.[3] In order for

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3. Curiously enough, Appellants herein have not alleged that Section

damages to be recoverable under the Tort Claims Act, a person must satisfy three statutory requirements. *Mascaro v. Youth Study Center, supra,* 523 A.2d at 1121. These requirements are set forth in Section 8542 of the Act:

> §8542. Exceptions to governmental immunity.
>
> (a) Liability imposed.—A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
>
> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and
>
> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.
>
> (b) Acts which may impose liability.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency: . . . .

42 Pa.C.S. §8542. The eight exceptions set forth in subdivi-

8553(d) denies them access to Pennsylvania Courts. Rather Appellants alleged that their insurance company, who has no cause of action against the City, has been denied such access. (*See*, Appellants' Jurisdictional Statement at pages 7-9.)

Even if Appellants were correct in their theory, their insured has not been denied a fundamental right. The Pennsylvania "Supreme Court has held that there is no fundamental right to sue the Commonwealth or its political subdivisions under either The United States or Pennsylvania Constitutions." *Germantown Savings Bank v. Philadelphia, supra,* at 98 Pa. Cmwlth. 514, 512 A.2d 759 (citations omitted).

sion (b) include: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals.

The first statutory prerequisite set forth in Section 8542(a)(1) is that the damages be recoverable under a cause of action created by either the common law or statute. In the appeal, *sub judice*, Federal Insurance Company, theory of subrogation. However, as admitted below by GSB, ICS and Federal Insurance Company have concluded, "subrogation is not a cause of action . . . ." Pa. Supreme Court Brief of Appellants at p. 10.

> The identity of a cause of action is not changed by the subrogation of the insurer thereto. Thus, subrogation results only in a change in the beneficial ownership of the cause and has no effect on the character or underlying basis of a cause of action.

Rhodes, Couch on Insurance, 2d §61.37 Rev. (1983).

Federal Insurance Company also failed to satisfy the second prerequisite imposed by Section 8542(a)(2); that is, said insurance company has not suffered any injury, the proximate cause of which was the City's negligence. The insurance company was obligated to compensate GSB and ICS because of its contractual relationship with them, and not because of any breach of duty the City owed Federal Insurance Company. Thus, threshold requirements for the imposition of liability upon political subdivision have not been met.

Moreover, Section 8553(c) of the Political Subdivision Tort Claims Act, specifically sets forth the only types of damages that are recoverable against a government tortfeasor. *See* pages 7-8 *supra*. Compensation for an insurance company's contractual obligation to pay an insured is not specified as a recoverable item of damage.

Secondly, the Commonwealth Court in *Michel v. the City of Bethlehem*, 84 Pa. Cmwlth. 43, 478 A.2d 164 (1984), held that Section 8553(d) bars a claim for subrogation because "the equitable doctrine of subrogation places the subrogee in the

precise position of the one to whose rights and *disabilities* he is subrogated." *Id.* at 478 A.2d 166 (emphasis added), citing *Fell v. Johnston*, 154 Pa. Super 470, 36 A.2d 227 (1944). The right of subrogation is purely derivative and equitable in nature; the insurer-subrogee merely succeeds to the rights of the insured-subrogor:

> *The right of subrogation is purely derivative as the insurer succeeds only to the rights of the insured,* and no new cause of action is created. In other words, the concept of subrogation merely gives the insurer the right to prosecute the cause of action which the insured possessed against anyone legally responsible for the latter's harm; and this is so even though the right of subrogation is expressly declared by statute. (citations omitted) (emphasis added).

Rhodes, Couch on Insurance, 2d §61.37 Rev. (1983). The doctrine of subrogation places the insurer in precisely the same position as the insured, "for one cannot acquire by subrogation what another, whose rights he claims, did not have." *Couch on Insurance*, 2d *supra* at §61.36; *accord*, *Coal Operators Casualty Co. v. United States*, 76 F.Supp. 681 (E.D. Pa. 1947). The equities of the subrogee are worked out through the legal rights of the subrogor. In this sense, subrogation may be broadly defined as the substitution of one party in the place of another with reference to a lawful claim or right. *Homeowner's Loan Corp. v. Crouse*, 151 Pa. Super 259, 30 A.2d 330 (1943). *First National Bank of Ashley v. Reily*, 165 Pa. Super 168, 67 A.2d 679 (1949); *Dominski v. Garrett*, 276 Pa. Super. 18, 419 A.2d 73 (1980). Thus, subrogation neither enlarges nor restricts the subroger's rights against an alleged tort-feasor. It simply places the insurer in the position of the insured for the equitable purpose of vindicating the legal rights of the insured.

Since GSB and ICS are precluded from recovering for insured losses, their insurer, Federal Insurance Company, is likewise precluded from recovering said losses from the City. Federal Insurance Company is subject, under the doctrine of

equitable subrogation, to all the limitations on recovery that the Political Subdivision Tort Claims Act places upon GSB and ICS.

The right invoked by the insurer, Federal Insurance Company, cannot be viewed in a vacuum; to the extent the right exists, it exists only in relationship to the other parties to this appeal. As against the City, Federal Insurance Company's claim can only be vindicated via the equitable doctrine of subrogation. However, as stated above, longstanding principles of equity will not allow such vindication.

In summary, Section 8553(d) does not extinguish or limit any cause of action cognizable under the Tort Claims Act; it merely limits recovery under any cause of action to uninsured losses. Furthermore, said statutory provision does not prevent a person injured by, conduct of local government, that falls within one of the eight exceptions to immunity, from full compensation. It merely shifts the burden of compensating said injuries. For those injured parties whose losses are not covered by an insurance policy, the local government will shoulder the responsibility for all losses recoverable under the Act. For those injured parties whose losses are covered by an insurance policy, the local government will shoulder responsibility for compensating all otherwise recoverable, non-insured losses; while the insurance company will bear the responsibility for compensating the party for the insured losses. No party that has a cause of action cognizable under the Pennsylvania Tort Claims Act, that is, Appellants GSB and ICS, is denied access to the courts under the provisions of 42 Pa. C.S. §8553(d).

B. WHERE A CHALLENGE TO ECONOMIC LEGISLATION IS PRESENT, SAID REGULATION MUST BE SUSTAINED WHERE IT SATISFIES THE RATIONAL RELATIONSHIP TEST

Appellants contend that if their insurer is not allowed to recover against the City the amount of the insured loss, then their insurer, Federal Insurance Company, will have been denied the equal protection of the laws, as guaranteed by the

federal and state constitutions. The Fourteenth Amendment to the United States Constitution provides, in part, that:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend XIV, §1.

Where state statutes regulating economic rights are concerned this Court has—with only one exception—consistently utilized the rationality test in its review of constitutional challenges to properly enacted legislation.

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as the desirability of particular statutory discriminations. *See, e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, or decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), in such economic areas, adopting regulation that only partially ameliorate a perceived evil to future regulations. *See e.g., Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489 75 S.Ct. 461, 464-465, 99 L.Ed. 563 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, *see, e.g., Day Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in

> the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. *See, e.g., Ferguson v. Skurpa,* 372 U.S. 726, 732 83 S.Ct. 1028, 1032, 10 L.Ed.2d 93 (1963) (footnote omitted.)

City of New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976); *Accord, Duke Power Company v. Carolina Environmental Study Group, Inc., supra,* and *Dandridge v. Williams,* 397 U.S. 471 (1970), *rehearing denied,* 398 U.S. 914 (1970). Indeed, the one exception to this principle during the last sixty years—*Morey v. Dowd,* 354 U.S. 477 (1957)—has since been overruled in *New Orleans v. Dukes, supra* at 427 U.S. 306.

The Pennsylvania appellate courts have held in the decision below that the right addressed by Section 8553(d) is the right to full economic compensation, which invokes the application of the rationality test:

> Appellants insist that their "important interest" in access to the courts has been restricted by Section 8553(d) of the Act. Appellants herein, however, are not denied access to the courts by Section 8553(d) of the Act—they are deprived only of the economic right to "full" compensation, i.e., subrogation. The appropriate level of scrutiny under the equal protection clause to be applied to the matter herein, therefore, is the rational relationship test.

Germantown Savings Bank v. City of Philadelphia, supra, at 98 Pa. Cmwlth. Ct. 514, 512 A.2d 756.

The Pennsylvania courts proceeded to rule that the statutory provision in question represented a balance between subjecting political subdivisions to unlimited liability and preserving the public fisc:

> In assessing a similar equal protection challenge to the Sovereign Immunity Act, we noted that:
>
> > A balance must be struck between unlimited potential liability and the need for fiscal security. Full monetary responsibility for the tortious conduct of [The Commonwealth's] agencies and employees involves the risk

> of an intolerable tax burden. . . . The legislature legitimately may take steps to preserve sufficient public funds to guarantee that the government will be able to continue to provide those services which it believes benefits the citizenry.

Id. at 98 Pa. Cmwlth. 516, 512 A.2d 760. And, as such, Section 8553(d) of the Tort Claims Act, was "rationally related to the legitimate government interest in clearly defining the extent to which a political subdivision is at risk . . . and not violative of equal protection." Id. at 98 Pa. Cmwlth 517, 512 A.2d 760-761. In utilizing the established federal standard to review a challenge to a wholly economic regulation, the Pennsylvania courts have done nothing that would present a substantial federal question.

Moreover, Appellee's position that no substantial federal question is further buttressed by this Court's action in other cases involving the constitutionality of provisions of various state tort claims statues. Indeed, in *Smith v. Philadelphia*, ____ U.S. ____ 107 S.Ct. 1265 (1987), this Court dismissed an appeal challenging the $500,000 ceiling on recovery against a political subdivision under Section 402 of the Act of November 26, 1978, 53 P.S. 5311.402, which was subsequently recodified as Section 8553(b) of the Tort Claims Act, 42 U.S.C. §3553(b).[4] Similarly an application for a writ of certiorari was denied in *Sambs v. City of Brookfield*, 97 U.S. 2d 356, 293 N.W. 2d 504 (1980), *cert denied*, 499 U.S. 1035 (1980). The Wisconsin Supreme Court had employed the rationality standard in rejecting a constitutional challenge to the $25,000.00 limit on recovery:

> It is the legislature's function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability of and cost of insurance, and the financial condition of the governmental units. It is the legislature's function to structure statutory

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4. Section 8553(b) of the Tort Claims Act is set forth at page 7 of this Motion.

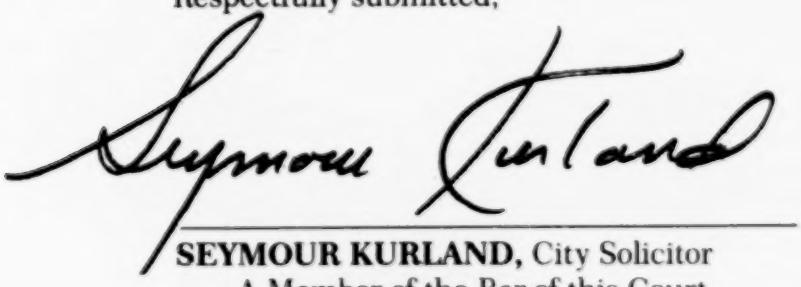
> provisions, which will be fair and reasonable to the victim and at the same time will be realistic regarding the financial burden to be placed on the taxpayers. Giving due deference to the legislature, this court will not set aside a statutory classification "if any state of facts reasonably may be conceived to justify it."

Id. at 514, quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Likewise, an appeal was also dismissed in a case upholding the New York Tort Claim Act $50,000 limitation upon damages. *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979), *appeal dismissed*, 445 U.S. 921 (1980).

CONCLUSION

For the reasons set forth above, Appellee, the City of Philadelphia, respectfully requests that this Court dismiss the appeal herein, or, in the alternative, affirm the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,



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